SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 414

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA-UE AND LOCAL 115-F, UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA-UE, PETITIONERS,

vs.

THE OLIVER CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INDEX

	Original	Print
Record from the United States District Court for the Northern District of Iowa	1	1
Notice of appeal	1	1
Order fixing amount of supersedeas and cost bond on appeal	3	3
Proceedings in the United States Court of Appeals for the Eighth Circuit	4	3
Order to show cause	4	3
Affidavit of David Scribner	6	4
Resistance to order to show cause	16	10
Affidavit of Boyd G. Hayes	18	12
Order denying application of appellants to stay order of District Court fixing amount of supersedeas bond, etc.	21	14
Order dismissing appeal	23	15
Order staying order concerning supersedeas bond, etc.	24	15
Order staying issuance of mandate	25	16
Notice of appeal	26	16
Clerk's certificate (omitted in printing)	28	

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[fol. 1]

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, EASTERN DIVISION

No. 533 Civil

THE OLIVER CORPORATION, Plaintiff,

vs.

UNITED ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA—UE

and

LOCAL 115-F, UNITED ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA—UE, Defendants

NOTICE OF APPEAL—Filed July 26, 1952

SIRS:

Please take notice that the United Electrical, Radio & Machine Workers of America—UE and Local 115-F, United Electrical, Radio & Machine Workers of America—UE, defendants above named, hereby appeal to the Court of Appeals for the Eighth Circuit from the order of the United States District Court for the Northern District of Iowa, Eastern Division, entered on the 3rd day of July 1952, granting plaintiff's motion fixing the amount of the supersedeas bond on appeal to this Court from a judgment entered on the 20th day of March 1952 granting judgment to the plaintiff in the amount of $17,961.13 on Count 2 with interest of five percent from January 25th, 1951, and $48,761.40 on Count 3 with interest at five percent from February 12th, 1951, together with taxable costs of this [fol. 2] action in the sum of $592.06, in the amount of $75,000.00 to be filed on or before the 3rd day of August, 1952, and from each and every part of said order in each and every respect. July 24, 1952.

Attorneys for Defendants: R. J. Sullivan, New Hampton, Iowa; David Scribner, 11 East 51st Street, New York, New York.

To: Boyd C. Hayes, Esq., 608 Clark Street, Charles City, Iowa; R. W. Zastrow, Esq., 715½ Kelly Street, Charles

City, Iowa; Lee McNeely, Clerk, U. S. District Court for the Northern District of Iowa, Dubuque, Iowa.

Filed in U. S. Court of Appeals on July 28, 1952.

[fol. 3] Copy

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, EASTERN DIVISION

[Title omitted]

ORDER FIXING AMOUNT OF SUPERSEDEAS AND COST BOND ON APPEAL

On July 2d, 1952, the defendants filed herein their Notice of appeal to the United States Court of Appeals for the Eighth Circuit from the judgment rendered against them in this case on March 20th, 1952. Counsel for the defendants have made oral request to the Court to fix the amount of the supersedeas and cost bond in connection with the appeal.

It is hereby ordered that the amount of the supersedeas bond on appeal be and the same is hereby fixed in the sum of Seventy-five Thousand Dollars ($75,000.00).

It is further ordered that the amount of the cost bond on appeal be and the same is hereby fixed in the sum of One Thousand Dollars ($1,000.00).

It is further ordered that if the defendants desire they may combine the two said amounts into one properly conditioned bond in the amount of Seventy-six Thousand Dollars ($76,000.00).

Signed in the Northern District of Iowa this 3rd day of July, 1952, for entry in the Eastern Division.

(S.) Henry N. Graven, United States District Judge.

Filed in the District Court July 3, 1952.
Filed in U. S. Court of Appeals on July 28, 1952.

[fol. 4] [File endorsement omitted]

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Title omitted]

ORDER TO SHOW CAUSE—Filed August 6, 1952

Upon the annexed affidavit of David Scribner, duly verified the 4th day of August, 1952, it is hereby

Ordered that the plaintiff-respondent show cause at a term of this Court, to be held in the Courthouse, Federal Building, at St. Paul, Minnesota, on the 11th day of August, 1952, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard why an order should not be made staying the order of the court below entered on the 3rd day of July, 1952, fixing a supersedeas bond on appeal from a judgment entered on the 20th day of March, 1952, against the defendant-appellants in the amount of $75,000, said stay to be in effect pending the disposition of the appeal from that order, and for such other, further [fol. 5] and different relief as to this Court may seem just and proper in the premises; and it is further

Ordered that the order of the court below entered on the 3rd day of July, 1952 fixing a supersedeas bond on appeal in the amount of $75,000, and any execution on the part of the plaintiff-respondent of the judgment of March 20, 1952 be stayed pending the hearing and determination of this motion.

Sufficient reason appearing therefor, service of this order and the annexed affidavit upon the attorneys for the plaintiff-respondent shall be made on or before the 7th day of August, 1952, and shall be deemed sufficient.

Dated: St. Louis, Missouri, August 6, 1952.

[fol. 6] UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Title omitted]

AFFIDAVIT OF DAVID SCRIBNER

STATE OF NEW YORK,
County of New York, ss.:

David Scribner, being duly sworn, deposes and says: That he is one of the attorneys for the defendant-appellants herein and submits this affidavit in support of an order to stay the order of the court below entered on the 3rd day of July, 1952, fixing a supersedeas bond on appeal from a judgment entered on March 20, 1952 against the defendant-appellants in the amount of $75,000, said stay to be in effect pending the disposition of the appeal from that order.

On the 25th day of July, 1952 the defendant-appellants filed an appeal from the order of the court below entered on the 3rd day of July, 1952, fixing the amount of the super-[fol. 7] sedeas bond. The Court stayed proceedings until August 3, 1952, by which time defendant-appellants are required to post the bond to maintain the stay. The Hon. Henry Graven, Judge of the Federal District Court for the Northern District of Iowa, who presided at the trial of the action herein, entered the order subsequent to argument on the motion held on the 19th day of May, 1952.

The plaintiff-respondent, Oliver Corporation, is a corporation engaged in the manufacturing of farm and industrial equipment at several plants including one located at Charles City, Iowa. The defendant, United Electrical, Radio and Machine Workers of America (UE) (hereinafter called EOU) is a labor organization representing more than 300,000 employees in the United States and Canada. The United Electrical, Radio and Machine Workers of America, Local 115F (hereinafter called Local 115F (UE)) is a local union chartered by the parent organization UE. Local 115F (UE) is the collective bargaining agent for the production and maintenance employees of the Charles City plant of the plaintiff Oliver Corporation. On December 6, 1950, a collective bargaining agreement was entered into between Oliver Corporation and the UE in conjunction with and in behalf

of the local union and its members. There are approximately 1100 employees at the Charles City plant of the corporation, the over*hwle*ming majority of whom are members of the UE.

[fol. 8] The assets of the defendant organizations are derived solely from the monthly dues and assessments paid by the membership. The defendant labor organizations in serving as a collective bargaining agent of the employees seek to advance the well-being of the membership and the improvement of wages and working conditions. To so protect the interests of the membership machinery is established whereby the grievances of the employees against the company may be negotiated and amicably adjusted. The dues and assessments derived from the membership are utilized to police the various bargaining agreements, to expedite the handling of grievances and the negotiation of collective bargaining agreements. The defendant organizations are engaged in no activity or business for profit but have as their sole purpose collective bargaining in behalf of its members.

The UE was first organized in September of 1936 and has over the years continuously represented hundreds of thousands of employees in the el-ctrical, radio and machine industry. The local union has continuously represented the employees of the Charles City, Iowa plant of the Oliver corporation for many years.

In January and February of 1951, there was a dispute between the company and its employees, resulting in a partial diminution of production for a period of approximately two weeks. The plaintiff corporation instituted an action for breach of contract under Section 301 of the Labor [fol. 9] Management Relations Act of 1947 on the grounds that the defendants had breached the collective bargaining agreement by engaging in a work stoppage in January and February of 1951. A trial was held, and on March 20th, 1952, judgment was entered in behalf of defendants on Count 1, and in behalf of the plaintiff on Count 2, in the amount of $17,961.13 with interest of 5% from January 25, 1951 and $48,761.40 on Count 3 with interest at 5% from February 12, 1951, together with taxable costs of the action in the amount of $592.06.

On the 19th day of May, 1952 argument was heard before the trial judge on defendants' motions for judgment notwithstanding the verdicts and for a new trial. At that time there was argument as to the amount of the supersedeas bond to be required of the defendants, were their motions to be denied. On the 3rd day of June, 1952, the Hon. Henry Graven, denied defendants' motion for judgment notwithstanding the verdict and for a new trial.

On the 3rd day of July, 1952, an appeal from the judgment of March 20, 1952 on Counts 2 and 3, and the denial of the motions for judgment notwithstanding the verdict and for a new trial was filed in the United States District Court for the Northern District of Iowa.

As the Court Recorder had not at that time and to this date has not prepared the transcript of the trial below, the [fol. 10] court granted the defendant-appellants 90 days from July 2, 1952 within which to file and docket the record on appeal. On the 3rd day of June, 1952, the Court stayed further proceedings for a period of 60 days without bond and on the 3rd day of July, 1952, entered the order appealed from herein setting the amount of the supersedeas bond on appeal in the sum of $75,000.

The judgment of the court below in granting judgment in behalf of the defendants on Counts 2 and 3 on the 20th day of March, 1952, raises substantial questions of law and fact. This appeal brings into issue the applicability and interpretation of Section 301 of the National Labor Relations Act of 1947. The defendant-appellants appeal in part on the grounds that the Court below charged the jury contrary to the law and in a manner prejudicial to the defendants, improperly excluded evidence in the course of the trial and denied defendants an opportunity to prove the absence of damages allegedly suffered by the plaintiff respondent. Deponent will not in this affidavit attempt to set forth in any detail the substantial questions of fact and law which warrant the review and reversal of the judgment below.

On May 19, 1952, in argument before Hon. Henry Graven, defendant-appellants had requested the court to exercise its discretion pursuant to Rule 73 of the Federal Rules of Civil [fol. 11] Practice, fixing the amount of the supersedeas bond, at a minimal amount. At that time, Judge Graven

stated that as a matter of law it was no longer within his discretion to grant a supersedeas bond on appeal in an amount less than the actual judgment and that he was required to set bond in this instance in the full amount of the judgment, to wit, $75,000. While a record of the proceedings on the 19th day of May, 1952 was made by the Court Reporter, he has as of the date of this affidavit not prepared or completed the transcript. However, the facts as set forth above reflect in essence the statements of the court as would be found in the transcript.

An appeal from this order was taken pursuant to Rule 75(j) of the Federal Rules of Civil Practice which states as follows:

> "Record for Preliminary Hearing in Appellate Court. If, prior to the time the complete record on appeal is settled and certified as herein provided, a party desires to docket the appeal in order to make in the appellate court a motion for dismissal, for a stay pending appeal, for additional security on the bond on appeal or on the supersedeas bond, or for any intermediate order, the clerk of the district court at his request shall certify and transmit to the appellate court a copy of such portion of the record or proceedings below as is needed for that purpose."

The defendant-appellants have found it necessary to immediately appeal the order of July 3rd, 1952. A super- [fol. 12] sedeas bond fixed at the full amount of the judgment does serious and irreparable harm to the appellants and unless said order is reversed, it may frustrate or endanger the defendants' right to appeal from the judgment of March 20, 1952. As such an appeal could not possibly be heard within the time allotted to the defendant-appellants for the posting of the supersedeas bond, this motion for the staying of that order is made. Were the defendant-appellants to be required at this time to post a bond in the amount of $75,000, it would cause irreparable harm and hardship and would endanger the financial integrity of the organization and the ability of the organization to act in behalf of its membership. It would deprive the organizations of the funds now necessary for the servicing and maintenance of

their membership. The defendant UE is engaged in collective bargaining negotiations with General Electric Corporation, Westinghouse, and many other corporations throughout the country. In the course of such negotiations considerable sums of money must be spent. In addition, the day to day requirements of handling the thousands of grievances that arise in the plants throughout the country require the expenditure of considerable sums of money. Unnecessary and substantial injury would be caused the thousands of members of the union were the supersedeas bond to be filed prior to the determination of this appeal. The [fol. 13] plaintiff-respondent in no respect would be prejudiced.

The court below erred in its order of July 1952 in that it failed to exercise its discretion in setting the amount of the bond. Rule 73(d) of the Federal Rules of Civil Practice states that the Court has discretion in setting the amount or the nature of the security required for a supersedeas bond on appeal. The court below erroneously held that it could not exercise any discretion whether it desired to do so or not in that under Rule 73(d) no discretionary powers were vested in the District Court. Rule 73(d) provides in part as follows:

> "Supersedeas Bond. Whenever an appellant entitled thereto desires a stay on appeal, he may present to the court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages as the appellate court adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest and damages for delay, unless the court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond . . ."

The leading commentator of the Federal Rules, James W. Moore, in Moore's Federal Practice, Volume III, at p. 3383, states as follows in commenting on Rule 73(d):

> [fol. 14] "This modifies U.S.C. Title 28, Section 874, (supersedeas). Provisions have been here added for giving the District Court power to ameliorate the possible harshness of the present rules in the proper cases.",

and further stated in his commentaries on Rule 73(d),

> "The 'unless' clause gives the District Court power to ameliorate the possible harshness of the present rules in the unusual case."

Rule 62(g) of the Federal Rules of Civil Practice provides that this Court has the power to "stay proceedings during the pendency of an appeal . . . or to make any order appropriate to preserve the status quo or the effectiveness of the judgment substantially to be entered."

The issue posed by this appeal is of considerable importance not only to the defendant labor organizations and all other labor organizations, but also to any judgment debtor who wishes to exercise his right of appeal. If the District Court is denied the opportunity to exercise its discretion in the setting of the amount of the supersedeas bond, in many instances such irreparable harm could be done to the judgment debtor as to deny him in effect the benefits of an appeal to this court. Such would be the results in the present instance. This federal procedural question is of sufficient import and sufficiently affects substantial rights as to require an ultimate and uniform determination in the Federal Courts.

[fol. 15] Deponent in the interest of justice respectfully requests that this appeal be expeditiously heard and that pending such appeal, the order of the court below requiring the posting of a supersedeas bond in the amount of $75,000 be stayed. Only by granting of the stay may the irreparable harm caused by the order of the court below be forestalled. As the plaintiff-respondent will suffer no injury by the granting of this stay, it is respectfully requested that the relief sought in the motion be granted forthwith.

A notice of motion, motion and supporting affidavit seeking the relief requested in this order to show cause, were transmitted to the office of the Clerk of the Court of Appeals of the Eighth Circuit, on the 31st day of July, 1952. Subsequent to that time, at the suggestion of the Clerk, deponent's office communicated with Hon. A. K. Gardner, Chief Justice of this Court, at which time it was suggested that I bring this proceeding before the Court by an order to show cause. Deponent withdraws the aforesaid notice of motion, motion and supporting affidavit, and in its place proceeds solely by this order to show cause. Other than as set forth above, no prior application for the relief sought herein has been made.

David Scribner.

Sworn to before me this 4th day of August, 1952. Marshall Perlin, Notary Public, State of New York. No. 30-8327675. Qualified in Nassau County. Certs. filed with N. Y., Kings, Queens & Bronx Co. Clks. and N. Y. Co. Reg. Off. Term Expires March 30, 1954.

[fol. 16] [File endorsement omitted]

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Title omitted]

RESISTANCE TO ORDER TO SHOW CAUSE—Filed August 11, 1952

Comes now The Oliver Corporation, plaintiff-respondent, and states:

I. That on the 6th day of August, 1952, an order to show cause was issued by the above Court requiring plaintiff-respondent to show cause why an order entered on the 3rd day of July, 1952, by the United States District Court for the Northern District of Iowa, Eastern Division, fixing a supersedeas bond on appeal for a judgment entered on the 20th day of March, 1952, against the defendants-appellants in the amount of $75,000.00 should not be stayed pending disposition of the defendants-appellants appeal from said order.

II. Plaintiff-respondent shows cause why said order should not be granted staying the said order of the Court below, and respectfully resists said order to show cause, on the following grounds and for the following reasons:

1. That under Rule 73(d) Federal Rules of Civil Procedure the lower Court was without authority or discretion to fix a supersedeas bond herein in an amount less than $75,000.00.

2. That the affidavit of David Scribner in support of the order to show cause issued by this Court on August 6, 1952, states no grounds, facts, justification or legal reason for the stay of the lower Court's order of July 3, 1952, fixing the supersedeas bond on appeal herein in the sum of $75,000.00.
[fol. 17] 3. That a further stay of the lower Court's order of July 3, 1952, requiring the defendants-appellants to post a supersedeas bond on appeal from the judgment entered on March 20, 1952, might seriously impair the rights of the plaintiff-respondent in the collection of its judgment.

III. That in support of this Resistance there is hereto attached, and by this reference made a part hereof, the affidavit of Boyd G. Hayes, one of the attorneys for plaintiff-appellant.

Boyd G. Hayes, 608 Clark Street, Charles City, Iowa.
R. W. Zastrow, North Main Street, Charles City, Iowa. Attorneys for Plaintiff-respondent.

Service accepted this 11th day of August, 1952, at approximately 9:30 A.M. at St. Paul, Minn.

Kenneth J. Enkel, Attorney for Defendants.

[fol. 18] UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Title omitted]

AFFIDAVIT OF BOYD G. HAYES IN SUPPORT OF RESISTANCE TO ORDER TO SHOW CAUSE

STATE OF IOWA,
County of Floyd, ss.:

I, Boyd G. Hayes, being duly sworn, on oath depose and say as follows:

1. That I am one of the attorneys for the plaintiff-respondent herein and submit this affidavit in support of plaintiff-respondent's resistance to order to show cause issued by the above Court on August 6, 1952, requiring plaintiff-respondent to show cause why an order should not be made staying the order of the United States District Court for the Northern District of Iowa, entered on the 3rd day July, 1952, fixing a supersedeas bond on appeal (from a judgment entered on the 20th day of March, 1952, against the defendant-appellants) in the amount of $75,000.00.

2. That on March 20, 1952, the lower Court entered judgment in favor of the plaintiff and against the defendants in the sum of $17,961.13 with interest thereon at the rate of five per cent per annum from January 25, 1951, on Count II of plaintiff's petition, and for $48,761.40, with interest thereon at the rate of five per cent per annum from February 12, 1951, on Count III of plaintiff's petition, and for costs. Said judgment was entered pursuant to a verdict returned [fol. 19] by a jury after the trial of the cause. Plaintiff's claim was for damages against the defendants, and each of them, for breach of contract which action was brought under the provisions of the Labor Management Relations Act, 1947 (commonly called the Taft-Hartley Law) 61 Stat. 156, 29 U. S. C. A. 185. That said judgment is for the recovery of money not otherwise secured.

3. That after the entry of the judgment defendant-appellants filed their motion for judgment notwithstanding the verdict and for motion for new trial. That on June 3, 1952, the lower Court entered its order overruling said

motions and on said date made its further order staying further proceedings in said cause for sixty days without bond. The lower Court on June 3, 1952, entered its memorandum to counsel stating that the sixty day stay of proceedings without bond was granted so as to give the defendants time to file notice of appeal and to arrange for a supersedeas bond subsequently to be furnished, and stating further that it was the view of the Court that it would be more orderly procedure for the Court to await the filing of the notice of appeal before making orders in regard to those matters. That on July 3, 1952, the defendant-appellants filed their notice of appeal appealing from the order of June 3, 1952, overruling their motions for judgment notwithstanding the verdict and for new trial and appealing from the judgment dated March 20, 1952. That on July 3, 1952, the Court entered its order fixing the defendant-appellants' supersedeas bond in the sum of $75,000.00 and a cost bond on appeal in the sum of $1,000.00.

4. That under Rule 73 (d), Federal Rules of Civil Procedure the lower Court had no authority or discretion to fix the amount of the supersedeas bond in a sum less than $75,000.00.

5. That the defendant-appellants are unincorporated associations. That an order further staying the order of the lower Court entered on July 3, 1952, fixing the supersedeas bond on appeal in the sum of $75,000.00 might seriously impair and jeopardize plaintiff-respondent's collection of said judgment.

[fol. 20] Boyd G. Hayes, 608 Clark Street, Charles City, Iowa.

Subscribed and sworn to before me by the said Boyd G. Hayes this 7th day of August, 1952. Amelia H. Lofgren, Notary Public in and for Floyd County, Iowa. My Commission Expires: July 4, 1954.

[fol. 21] UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Title omitted]

ORDER DENYING APPLICATION OF APPELLANTS TO STAY ORDER OF DISTRICT COURT FIXING AMOUNT OF SUPERSEDEAS BOND, ETC.—August 11, 1952

Order was issued August 6, 1952, made returnable before this Court at St. Paul, Minnesota, on August 11, 1952, at 10:30 o'clock in the forenoon, requiring plaintiff-respondent in the Court below, The Oliver Corporation, to show cause why the Order of the United States District Court for the Northern District of Iowa entered on July 3, 1952, should not be stayed pending appeal, which said order fixed the amount of supersedeas bond in the sum of $75,000.00 on an appeal from a judgment entered March 20, 1952. Resistance to order to show cause with supporting affidavit was filed by appellee.

The motion of defendant-appellants for a stay was considered in the nature of an application to stay the order fixing the amount of supersedeas pending the appeal, or to fix the amount of supersedeas at an amount less than that fixed by the order of the District Court.

On Consideration of the showing made by the respective parties and the arguments of counsel, Mr. Kenneth J. Enkel of Minneapolis, Minnesota, appearing for appellants, and Mr. Boyd G. Hayes and Mr. R. W. Zastrow of Charles City, Iowa, for the appellee, the Court is of the opinion that the Order to show cause should be, and is hereby, discharged, [fol. 22] and the application as to order of the District Court fixing amount of supersedeas at $75,000.00 should be, and is hereby, denied, and the Court hereby declines to reduce the amount of the supersedeas bond fixed by the trial Court.

And it is further Ordered by the Court that appellants be, and they are hereby, granted forty days from this date in which to post supersedeas bond in accordance with the Order of the trial court.

August 11, 1952.

[fol. 23] UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

UNITED ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA —UE, and Local 115-F, United Electrical, Radio & Machine Workers of America—UE, Appellants,

vs.

THE OLIVER CORPORATION

ORDER DISMISSING APPEAL FROM ORDER OF DISTRICT COURT FIXING AMOUNT OF SUPERSEDEAS BOND, ETC.—August 11, 1952

This is an appeal taken from an Order of the United States District Court for the Northern District of Iowa in its cause No. 533, Civil, entered July 3, 1952, fixing a supersedeas bond on appeal in the amount of $75,000.00 from a judgment entered on March 20, 1952, and this Court being of the opinion that said Order fixing amount of supersedeas is not appealable, It is therefore Ordered that this purported appeal from said order be, and it is hereby, dismissed.

August 11, 1952.

[fol. 24] UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Title omitted]

ORDER STAYING ORDER CONCERNING SUPERSEDEAS BOND, ETC.— September 17, 1952

On application of Mr. Kenneth J. Enkel, counsel for appellants, It is Ordered by this Court that the appellants be, and they are hereby granted a stay of the order of this Court entered August 11, 1952, denying the application of appellants to stay order of the District Court of July 3, 1952, fixing amount of supersedeas at the sum of $75,000.00 pending appeal to this Court from the judgment of the District Court of March 20, 1952, or to fix the amount of supersedeas at an amount less than that sum, but granting appellants forty days from August 11, 1952, in which to post supersedeas bond in accordance with the order of the trial court.

The stay hereby granted is for a period of thirty days from and after this date, and if within this period proposed petition for writ of certiorari is filed in the Supreme Court of the United States in these causes and remains undisposed of, then a further stay is hereby granted pending the ruling of the Supreme Court.

September 17, 1952.

[fol. 25] UNITED STATES COURT OF APPEALS

[Title omitted]

ORDER STAYING ISSUANCE OF MANDATE, ETC.—September 17, 1952

On Consideration of the motion of the appellants for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

September 17, 1952.

[fol. 26] [File endorsement omitted]

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, EASTERN DIVISION

[Title omitted]

MOTION OF APPEAL—Filed July 2, 1952

SIRS:

Please take notice that the United Electrical, Radio & Machine Workers of America—UE, and Local 115-F, United Electrical, Radio & Machine Workers of America—UE,

defendants above named, hereby appeal to the Court of Appeals for the Eighth Circuit from the order of the United States District Court for the Northern District of Iowa, Eastern Division, entered on June 3rd, 1952, overruling and denying defendants' motion for judgment notwithstanding the verdict and defendants' motion for a new trial; and from the order and judgment of that court granting judgment to the plaintiff in the amount of $17,961.13 on Count 2, with interest at five per cent from January 25, 1951, and $48,761.40 on Count 3, with interest at five per cent from February 12, 1951, together with taxable costs [fol. 27] of this action in the sum of $592.06, filed and entered on March 20th, 1952.

Defendants appeal from these orders and judgments in each and every respect, and from all proceedings during the trial of said cause.

July 1, 1952.

Attorneys for Defendants: R. J. Sullivan, New Hampton, Iowa. David Scribner, 11 East 51st Street, New York, New York.

To: Boyd G. Hayes, Esq., 608 Clark Street, Charles City, Iowa. R. W. Zastrow, Esq., 715½ Kelly Street, Charles City, Iowa. Lee McNeely, Clerk, U. S. District Court for the Northern District of Iowa, Dubuque, Iowa.

Filed in U. S. Court of Appeals on July 28, 1952.

[fol. 28] Clerk's Certificate to foregoing transcript omitted in printing.

V

Office - Supreme Court
FILED
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HAROLD B. WILLEY,

Supreme Court of the United States

OCTOBER TERM, 1952

No. 414

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA—UE and LOCAL 115-F, UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA—UE,

Petitioners,

against

THE OLIVER CORPORATION,

Respondent.

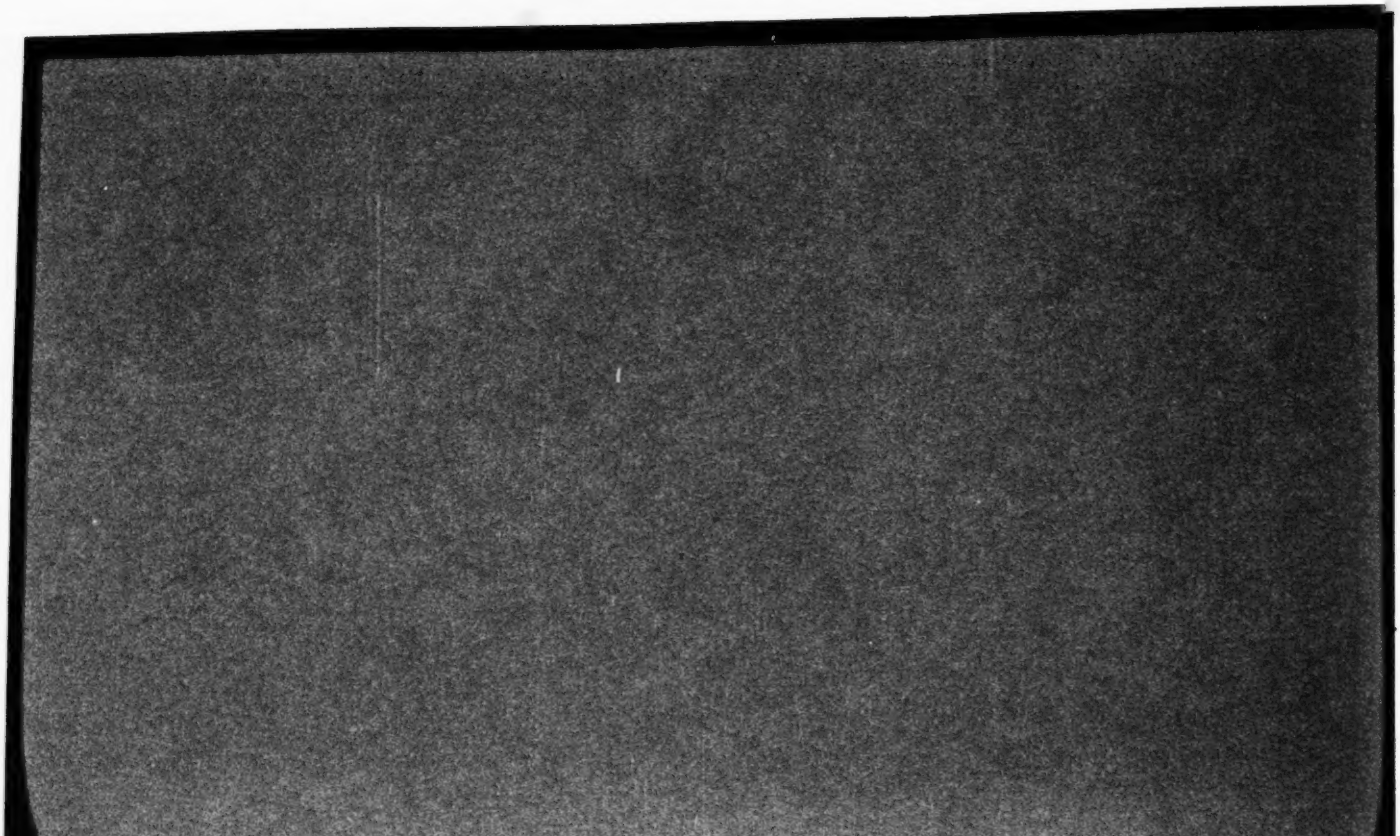
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ARTHUR KINOY AND FRANK J. DONNER,
104 East 40th Street,
New York, New York,
Attorneys for Petitioner.

Of Counsel:

DAVID SCRIBNER,
11 East 51st Street,
New York, New York.

DONNER, KINOY & PERLIN,
By ARTHUR KINOY,
MARSHALL PERLIN.



INDEX

PAGE

PETITION 1

OPINION BELOW 2

JURISDICTION 2

PRELIMINARY STATEMENT 2

A—The Proceedings Below 2

B—Statement of Facts 4

STATUTES INVOLVED 9

QUESTIONS INVOLVED 10

SUMMARY STATEMENT OF THE MATTER INVOLVED 10

REASONS FOR GRANTING THE WRIT 11

I—A District Court has power under Rule 73(d) of the Federal Rules of Civil Procedure to set a supersedeas bond in an amount less than the whole amount of the judgment plus costs, interest and damages for delay 11

II—An order of a District Court refusing to exercise any discretion in setting the amount of a supersedeas bond under Rule 73(d) on the ground that it has no power to do so is an appealable order 14

III—Conclusion 17

APPENDIX 19

CASES CITED

Cohen v. Beneficial Industrial Loan Corp., 337 U. S. 541, 69 Sup. Ct. 1221 ..... 14, 15

Dixie Cup Co. v. Paper Container Mfg. Co., 174 F. 2d 834 (CA 7, 1949) 16

PAGE

G. C. Mansour v. Bergeron, 8 Fed. Rules Serv. 73(d) 21, case 1, C. D. Ct. Mass. (1945) 13

McWilliams Dredging Co., et al. v. Dept. of Highways of Louisiana, 187 F. 2d 61 (CA 5, 1951) 16

Newton, et al. v. Consolidated Gas Co. of New York, 265 U. S. 76, 44 Sup. Ct. 481 16

Powell v. Maryland Trust Co., 125 F. 2d 260 (CA 4, 1942) 15

STATUTES AND AUTHORITIES

Federal Appellate Practice as Affected by the New Rule of Civil Procedure, Ilsan and Howe, 24 Minn. Law Rev. 1 (1939) 2 Fed. Rules Serv. 720, 741, commenting on Rule 73(d) 13

Federal Practice, Ohlinger, Vol. 3A, page 633 13

Federal Rules of Civil Procedure:
Rule 73(d) 8, 9, 10, 11, 12, 13, 14, 17
Rule 75(j) 15

Labor-Management Relations Act of 1947:
Section 301 ..... 5, 10
Section 303 10

Moore's Federal Practice, Vol. III, page 3383 13

Proceeding of the American Bar Association Institute (Cleveland, 1938) 361 13

United States Judicial Code:
Title 28, Section 874 12
Title 28, Section 1254 2
Title 28, Section 1291 ..... 10, 14
Title 28, Section 1292 14

Supreme Court of the United States

OCTOBER TERM, 1952

No. ———

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA—UE and LOCAL 115-F, UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA—UE,

Petitioners,

against

THE OLIVER CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The United Electrical, Radio and Machine Workers of America—UE and Local 115-F, United Electrical, Radio and Machine Workers of America—UE, labor organizations, as representatives of all of the members thereof, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit dismissing an appeal from an order of the District Court for the Northern District of Iowa, Eastern Division, setting the amount of a supersedeas bond on appeal from a judgment entered on the 20th day of March, 1952, against the petitioners in the amount of $75,000.

Opinion Below

The memorandum orders of the Court of Appeals (R.) and the District Court (R.) appealed from herein are not as yet reported.

Jurisdiction

The judgment of the Court of Appeals was rendered on September 11, 1952. The jurisdiction of this Court is invoked under Title 28, Section 1254, of the United States Judicial Code.

Preliminary Statement

A—The Proceedings Below

Plaintiff-respondent, The Oliver Corporation, instituted a breach of contract action pursuant to Section 301 of the Labor-Management Relations Act of 1947, against the defendant-petitioners. The complaint was composed of three causes of action against both of the defendant-petitioners herein and sought judgment against the defendant-petitioners in the amount of $122,815.72. Trial of the action was had before the Hon. Henry N. Graven, United States District Judge, and a jury in the United States District Court for the Northern District of Iowa, Eastern Division. The trial proceedings commenced on the 11th day of March, 1952, and on the 20th day of March, 1952, judgment was rendered on behalf of the defendants as to Count One; judgment was rendered for the plaintiff in the amount of $17,961.13 on Count Two with interest at 5 percent from January 25, 1951; and judgment was rendered for plaintiff in the amount of $48,761.40 with interest at 5 percent from February 12, 1951, on Count Three; taxable costs of the action were assessed in the sum of $592.06 (R.).

Defendants then moved for judgment *non obstante verdicto* and in the alternative, for a new trial. Defendants further moved for a stay of the proceedings and requested that the court fix a supersedeas bond on appeal, if the motions for a new trial and judgment *non obstante verdicto* were denied, in an amount as may secure the costs and accruing costs for delay pending the disposition of the motions and appeal. On June 3, 1952, the court denied defendants' motion for judgment *non obstante verdicto* and for a new trial, and further by separate order directed that the proceedings in the case be stayed for a period of 60 days without bond.

On the 2nd day of July, 1952, the defendant-petitioners filed their notice of appeal (R.). Delay in obtaining the transcript of the proceedings before the District Court has caused the District Court and the Court of Appeals to grant defendant-petitioners until December 10, 1952, to docket and file the record and briefs on appeal.

On July 3, 1952, the District Court entered an order fixing the amount of the supersedeas bond on appeal at $75,000 and set the cost bond on appeal in the amount of $1,000 (R.). On July 26, 1952, the defendant-petitioners filed a notice of appeal from that order (R.).

On July 28, 1952, both notices of appeal and the order of the District Court dated July 3, 1952, were docketed in the Court of Appeals for the Eighth Circuit. The order of July 3, 1952, was transmitted to the Court of Appeals. On August 6, 1952, defendant-petitioners filed an order to show cause in the United States Court of Appeals for the Eighth Circuit returnable on August 11, 1952, directing the plaintiff-respondents to show cause why the order of the District Court entered on July 3, 1952, setting the amount of the supersedeas bond at $75,000 should not be stayed, pending the appeal from said order (R.). Resistance to the order to show cause with supporting affidavits was filed by the plaintiff-respondents on August

11, 1952 (R.). On August 11, 1952, the United States Court of Appeals for the Eighth Circuit dismissed the appeal from the order of July 3, 1952, fixing the amount of the supersedeas bond on appeal on the ground that said order was not appealable (R.). The court further discharged the order to show cause and granted the defendant-petitioners 40 days within which to post the supersedeas bond on appeal (R.). On September 17, 1952, the court continued the stay of the judgment below without the posting of a bond to October 17, 1952 (R.). On October 16, 1952, defendant-respondents were granted an additional 10 days within which to file a petition for certiorari and maintain a stay of the proceedings below (R.). The stay remains in full force and effect pending a disposition by this Court of this petition for a writ of certiorari.

B—Statement of Facts

The plaintiff-respondent, The Oliver Corporation, hereinafter referred to as the Corporation, is a corporation engaged in the manufacturing of farm and industrial equipment at several plants in the United States. One of its plants is located at Charles City, Iowa (R.).

The defendant-petitioner United Electrical, Radio and Machine Workers of America—UE, hereinafter referred to as UE, is a labor organization of hundreds of thousands of men and women employed in the electrical, radio and machine industry, members of which are residents of states throughout the country and Canada (R.).

The defendant-petitioner United Electrical, Radio and Machine Workers—UE, Local 115-F, hereinafter referred to as Local 115-F, UE, is a local union chartered by the parent organization UE. It is the certified collective bargaining agent for the production and maintenance employees of the Charles City plant of the Corporation and has represented said production and maintenance employees for many years (R.). On July 20, 1949, a collective bargaining agreement was entered into between the Cor-

poration and the petitioners. Said collective bargaining agreement covered the terms and conditions of employment of the employees at the Charles City plant of the Corporation. The overwhelming majority of the aforesaid employees were members of the collective bargaining agent (R.).

The assets of the defendant organizations are derived solely from monthly membership dues and initiation fees paid by the individual members (R.). UE and Local 115-F, UE, have no other source of income, nor are they engaged in any activity or business for profit. They have as their sole purpose collective bargaining in behalf of their members (R.). They seek to advance the well-being of the membership and to obtain improvements in wages and working conditions. To accomplish these beneficent ends, elaborate machinery has been established by the parent organization and the Local Union to process the grievances of the individual employees. Furthermore, the collective bargaining agreement referred to hereinabove provides for grievance machinery so as to obtain amicable adjustments of differences which may arise between the employees and the Corporation as to conditions of employment (R.).

The UE was first organized in September, 1936, and has over the years continuously represented hundreds of thousands of employees in the electrical, radio and machine industry (R.).

In January and February of 1951 there was a dispute between the Corporation and certain of its employees which resulted in a partial diminution of production for a period of approximately two weeks (R.). Subsequent to that time the Corporation instituted an action for breach of contract under Section 301 of the Labor-Management Relations Act of 1947 on the grounds, amongst others, that the defendants had breached the collective bargaining agreement by engaging in a work stoppage in January and February of 1951, and that further they had failed to

utilize the grievance machinery provided in the aforesaid contract (R.).

A trial was held before the Hon. Henry N. Graven, Judge of the United States District Court, and a jury at the Federal Courthouse at Waterloo, Iowa. Evidence was adduced from March 11 to March 20, 1952. On March 19, 1952, following the presentation of evidence, the defendants moved for a directed verdict in their favor as to Count One in the complaint and on March 20th, the said motion was sustained and the jury by direction of the court returned a verdict in favor of both defendants as to Count One. On March 20, 1952, the jury returned a verdict in favor of plaintiff against both defendants on Count Two in the sum of $17,961.13, and further returned a verdict in favor of plaintiff on Count Three against both defendants in the sum of $48,761.40, and a judgment to that effect with interest was entered on that date (R.).

The petitioners then timely moved for a new trial and judgment *non obstante verdicto*. Petitioners further moved that the supersedeas bond pending appeal should be set in an amount solely to cover the costs incurred and the costs to be incurred pending the appeal (R.). Argument was had in the District Court before the trial judge on May 19, 1952. On June 3, 1952, the court denied defendants' motions for judgment *non obstante verdicto* and for a new trial (R.).

In the course of the argument as to the supersedeas bond, counsel for the petitioners stated that were the bond to be in the entire amount of the judgment, it would create a tremendous burden on the defendants, limit their right to appeal and substantially and seriously impair their ability to function in behalf of their thousands of members. Counsel stated:

> "While the defendants are solvent, yet it would create a hardship and difficulty to set aside so much money, particularly when there are serious questions of law involved, such as we have here" (R.),

Counsel requested the court pursuant to the Federal Rules of Civil Procedure to exercise its discretion in setting the amount of the supersedeas bond on appeal. It was further requested that if the court were to set a supersedeas bond in addition to that covering the costs on appeal, that said bond should be less than the amount of judgment. The District Court stated, as the record will clearly reveal, that it had no discretion whatsoever in the setting of a supersedeas bond in an amount less than that of the judgment (R.). The court held as a matter of law that the bond must cover the amount of judgment and adverted to an unreported decision of the Court of Appeals for the Eighth Circuit which held that the District Court had no discretion whatsoever in setting the amount of a supersedeas bond at a figure less than that of the judgment. Upon counsel's request for an opportunity for a separate hearing on the question of the amount of the supersedeas bond, the court stated:

> "I went through that matter just a few months ago in which that very thing came up, in which I was willing to do the same thing, and counsel took the matter up to the Court of Appeals who said that I could not do it" (R.).

On July 3, 1952, the court entered the order appealed from herein setting the amount of the supersedeas bond on appeal at $75,000 and the bond covering costs at $1,000 (R.). The court further granted the defendants 60 days within which to post said bond during which time the proceedings were stayed. On July 2, 1952, a notice of appeal from the judgment of the court entered on the 20th day of March, 1952, was filed with the Clerk of the District Court (R.). On July 26, 1952, the defendants filed a notice of appeal from the order of July 3, 1952, with the Clerk of the District Court (R.).

On August 6, 1952, the petitioners moved by order to show cause returnable August 11, 1952, for a stay of the order of July 3, 1952, fixing the amount of the supersedeas

bond on appeal, pending the disposition of the appeal from said order (R.). The supporting affidavit of David Scribner, one of the attorneys for the petitioners, sets forth the nature of the parties in the proceeding, the nature of the action below, the judgment rendered, and considerations warranting the Court of Appeals granting a stay of the proceedings below pending a determination of the appeal from the order of July 3, 1952 (R.).

It not being germane to the proceeding, only passing reference was made to the important issues of law and fact that the Court of Appeals would consider on hearing the appeal from the judgment of March 20, 1952. The order and supporting affidavit did not avert to the facts nor set forth reasons at law why the amount of the supersedeas bond should be reduced, but solely sought a stay of the order setting the amount of the supersedeas bond pending appeal. At no time did the petitioners present to the court evidence relating to the amount of the bond. Petitioners stated that the District Court erred by its order of July 3, 1952, by finding as a matter of law that it had no discretion to reduce the bond. The motion of the petitioners related solely to the granting of a stay pending appeal. The defendant-petitioners further expressed their desire to expeditiously prosecute the appeal.

The resistance to the order to show cause with supporting affidavit was filed by the plaintiff-respondent on August 11, 1952 (R.). The affidavit of the plaintiff-respondent was directed solely to the question of law as to whether or not the District Court had, under Rule 73(d) of the Federal Rules of Civil Practice, discretion to set the amount of the supersedeas bond at a sum less than the full value of the judgment (R.). The matter in controversy before the Court of Appeals related solely to the question of law as to whether or not the District Court had any discretion in the setting of bond.

On August 11, 1952, the court entered an order dismissing the appeal from the order of July 3, 1952, on the

ground that said order was not appealable (R.). The court simultaneously discharged the order to show cause (R.).

The court granted the defendant-petitioners 40 days within which to post a supersedeas bond and on September 17, 1952, granted the defendant-petitioners an additional 30 days within which to post the supersedeas bond, during which time the stay was in full force and effect. Upon the docketing of the petition for a writ of certiorari, the stay was to be continued until the matter was disposed of by this Court (R.). On October 16, 1952, under the same conditions, the Court of Appeals granted the defendant-petitioners an additional stay of 10 days, to the 27th day of October, 1952, and further ordered a continuance of the stay pending a disposition by this Court of this petition for a writ of certiorari (R.).

Statutes Involved

Rule 73(d) of the Federal Rules of Civil Procedure.

"(d) Supersedeas Bond. Whenever an appellant entitled thereto desires a stay on appeal, he may present to the court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond * * *."

Title 28, Section 1291, United States Code.

"Section 1291. Final decisions of district courts.

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Questions Involved

1. Whether a district court under Rule 73(d) of the Federal Rules of Civil Procedure has power to set a supersedeas bond in an amount less than the whole amount of the judgment, cost interest, and damages for delay?

2. Whether an order of a district court refusing to exercise any discretion in setting the amount of a supersedeas bond under Rule 73(d) of the Federal Rules of Civil Procedure on the ground that it has no power to do so is an appealable order?

Summary Statement of the Matter Involved

The questions here presented involve important problems in the administration and functioning of federal appellate procedures particularly in relation to the increasing number of breach of contract actions litigated in the federal courts under the provisions of the Labor-Management Relations Act of 1947, Sections 301 and 303.

After a trial of the issues and the rendering of a substantial judgment for the respondent-corporation the District Court held that it had no *power* to set a supersedeas bond in an amount less than the whole amount of the judgment, costs, interest and damages for delay. Although this interpretation of Rule 73(d) would seem to be squarely in conflict with the plain words of the federal rule and the

clearly stated legislative intention, the Court of Appeals refused any redress to petitioner holding that an order setting a supersedeas bond is not an appealable order.

If the interpretation of Rule 73(d) of the Federal Rules of Civil Procedure adhered to in the Court of Appeals for the 8th Circuit, as a consequence of these rulings, is not reviewed and rejected by this Court the salutary purposes of Rule 73(d) will be totally frustrated and the right to appeal against substantial money judgments will be seriously jeopardized particularly in labor-management situations.

Reasons for Granting the Writ

There are presented here for decision several important questions involving the administration of federal law and the functioning of federal appellate review which should be settled by this Court. These questions have been decided in a way probably in conflict with the applicable decisions of this Court.

I

A District Court has power under Rule 73(d) of the Federal Rules of Civil Procedure to set a supersedeas bond in an amount less than the whole amount of the judgment plus costs, interest and damages for delay.

After judgment was rendered for the respondent-Employer in the amount of $66,722.53 with costs and interest, the petitioner moved for the setting of a supersedeas bond on appeal in an amount less than the whole amount of the judgment plus costs, interest and damages for delay. Petitioner urged that the setting of such a bond in the total amount would seriously impair the ability of the union to continue to represent its members in collective bargaining as well as jeopardize the right to appeal itself. Petitioner sought a hearing and opportunity to adduce evi-

dence on this question in accordance with Rule 73(d) which states, *inter alia*:

> "When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, *unless the court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond.*" (Italics added.)

Despite the clear wording of the Rule the District Court held as a matter of law that it had no power to set a supersedeas bond in any lower amount. The transcript of the proceedings * reveals the District Court's conception This interpretation as to the power of the District Court would appear to be wholly erroneous.

Rule 73(d) of the Federal Rules of Civil Procedure modifies and replaces Section 874 of Title 28, U. S. C. The former statute made mandatory the setting of a supersedeas bond in the full amount of the judgment plus interest and cost. New Rule 73(d) was specifically designed to replace the mandatory character of the old statute by vesting discretionary power in the District Court to set a supersedeas bond in an amount lower than the total judgment. The Advisory Committee Note to Rule 73(d) states:

> "This modifies U. S. C., Title 28, Sect. 874 (supersedeas). Provisions have been here added for giving the district court power to ameliorate the possible harshness of the present rules in proper cases."

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* This transcript of the proceedings before the district court was not transcribed by the court reporter prior to the hearing on the appeal before the Court of Appeals. It was referred to, however, in the affidavits of counsel. Petitioner will move before the Court of Appeals to include this transcript of hearing in the papers certified as the record to this Court. For the convenience of this Court we attach the pertinent sections of this transcript as an appendix to this petition.

In commenting upon the purpose of the "unless" clause in Rule 73(d) Professor Moore states:

> "The 'unless' clause gives the District Court power to ameliorate the possible harshness of the present rules in the unusual case."
>
> *Moore's Federal Practice,* Vol. III, p. 3383.*

The intention underlying the proposal of the Advisory Committee in drafting the new rule is set forth in the remarks of William D. Mitchell at the American Bar Association Institute on the Federal Rules in 1938:

> "That last clause was put in there to cover cases (some of which were brought to the attention of the Advisory Committee) where money judgments had been entered against defendants in enormous sums and they were utterly unable to give a supersedeas bond to stay the execution of the judgment—they did not have sufficient assets. Their right of appeal and stay was practically destroyed, and this allows the court in a case of hardship of that kind, on notice and hearing, to determine what the security ought to be * * *."
>
> Proceeding of the American Bar Association Institute (Cleveland, 1938) 361.

The purpose of the Rule, therefore, was to vest power in the district court to set, at its discretion, a supersedeas bond in an amount lower than the total judgment in order to preserve the right to appeal in cases where the older statute would have created serious hardship. G. C. *Mansour* v. *Bergeron,* 8 Fed. Rules Serv. 73(d) 21, case 1, C. D. Ct. Mass. (1945).

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* See Ilsan and Howe, *Federal Appellate Practise as Affected by the New Rule of Civil Procedure,* 24 Minn. Law Rev. 1 (1939) 2 Fed. Rules Serv. 720, 741, commenting on Rule 73(d):

> "This rule also contains an eminently fair provision, which is entirely new, giving the court after notice and hearing and for good cause shown the power to fix a different amount or order security other than the bond."

See also Ohlinger, *Federal Practice,* Vol. 3A, p. 633,4.

The assumption of the district court in this proceeding that it had no power to entertain such an application was thus clearly erroneous and if adhered to would frustrate the liberalizing purposes of Rule 73(d) if not effectively negate the Rule itself.

II

An order of a District Court refusing to exercise any discretion in setting the amount of a supersedeas bond under Rule 73(d) on the ground that it has no power to do so is an appealable order.

The Court of Appeals failed to correct the district court's erroneous conception of its power on the ground that an order setting the amount of a supersedeas bond is not an appealable order.

This ruling by the Court of Appeals would seem to be in direct conflict with the applicable decisions of this Court.

Title 28, U. S. C. Section 1291 provides for appeal only "from all final decisions of the district courts."* This Court has only recently held that an order setting security is an appealable order within the meaning of Section 1291.

In *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 69 Sup. Ct. 1221, this Court has held that an order involving the power or right of the district court to set security is an appealable order. Mr. Justice Jackson wrote:

> "At the threshold we are met with the question whether the District Court's order refusing to apply the statute was an appealable one.
>
> " * * * this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably

* Title 28, U. S. C., Section 1292, allowing appeals from certain interlocutory orders is not here involved.

irreparably. We conclude that the matters embraced in the decision appealed from are not of such an interlocutory nature as to affect, or to be affected by, decision of the merits of this case.

"This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction. Bank of Columbia v. Sweeney, 1 Pet. 567, 569, 7 L. Ed. 265; United States v. River Rouge Improvement Co., 269 U. S. 411, 414, 46 S. Ct. 144, 145, 70 L. Ed. 339; Cobbledick v. United States, 309 U. S. 323, 328, 60 S. Ct. 540, 542, 84 L. Ed. 783."

Justice Jackson concluded for the Court:

"We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it * * *."

In *Cohen* v. *Beneficial Industrial Loan Corp., supra,* this Court has pointed out that not every order fixing security is subject to appeal. Where the district court's power to act is not the issue but rather merely a challenge to the way in which its discretion has been exercised, "appealability would present a different question". Here, as in the *Cohen* case, the order fixing security involves a question as to the *power* of the district court. This Court has held that such an order is appealable.*

* It may be suggested that the proceeding in the Court of Appeals constituted a hearing on the merits on the setting of a supersedeas bond under Rule 75(j). No such application was made or argued to the Court of Appeals. The Court was asked to stay the supersedeas order by order to show cause, pending the appeal from the supersedeas order itself. The Court vacated the order to show cause and dismissed the appeal as not being from an appealable order. It would seem in any event that Rule 75(j) is available only for a request for *additional* security. Compare *Powell* v. *Maryland Trust Co.*, 125 F. 2d. 260 (CA 4, 1942); Rule 75(j) F. R. C. P.

Directly analogous are the rulings as to the appealability of orders taxing costs. In *Newton, et al.* v. *Consolidated Gas Co. of New York,* 265 U. S. 76, 44 Sup. Ct. 481, this Court in an opinion by Chief Justice Taft, held that where questions are raised concerning the *power* of the court to tax certain types of costs, such orders are appealable.

In *McWilliams Dredging Co., et al.* v. *Dept. of Highways of Louisiana,* 187 F. 2d 61 (CA 5, 1951), the Court of Appeals for the Fifth Circuit recently applied this principle holding,

> "Appealing from an order taxing costs, appellants are here insisting that it should be reversed.
>
> "(1) Invoking the general rule that an appeal does not lie from a decree solely for costs, appellee insists that the appeal should be dismissed as one merely involving discretion, and, in the alternative, that if appealable, the order should be affirmed.
>
> "(2) Since the refusal below to tax most of the items was based not upon the exercise of discretion but upon want of power to do so, it is clear that the order was appealable. We cannot, therefore, agree with appellee that the appeal should be dismissed."

Compare also *Dixie Cup Co.* v. *Paper Container Mfg. Co.,* 174 F. 2d 834 (CA 7, 1949), holding an order setting attorneys' fees appealable.

Under the rules and principles enunciated by this Court it would appear that the order of the district court is an appealable order.

III

Conclusion

The impact of the rulings of the district court and the Court of Appeals upon labor-management relations is severe. Unless these clearly erroneous rulings are reversed by this Court the right to appeal in the many substantial damage suits now pending against labor unions under the provisions of the Labor-Management Relations Act may become meaningless. If Rule 73(d) is to be deprived of its meaning, the arbitrary requirement that a supersedeas bond must be set in the total amount of the judgment may well become a principal method in harassing and crippling labor organizations even prior to their exercise of their right to appeal from such judgments.

Petitioner respectfully suggests that on the clear state of the legal issues herein, and in the interest of expediting the appeal-in-chief, this Court should grant the writ of certiorari and reverse the order appealed from without further oral argument and remand the proceedings to the District Court with instructions to exercise its discretion upon notice and hearing pursuant to Rule 73(d) as to whether a bond in an amount less than the total judgment should be set.

Respectfully submitted,

ARTHUR KINOY AND FRANK J. DONNER,
104 East 40th Street,
New York, New York,
Attorneys for Petitioner.

By ARTHUR KINOY.

Of Counsel:
DAVID SCRIBNER,
11 East 51st Street,
New York, New York.

DONNER, KINOY & PERLIN,
By ARTHUR KINOY,
MARSHALL PERLIN.

APPENDIX

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF IOWA

EASTERN DIVISION

THE OLIVER CORPORATION, Plaintiff, v. UNITED ELECTRICAL RADIO AND MACHINE WORKERS OF AMERICA, U. E., *et al.*, Defendants.	No. 533 CIVIL DISCUSSION ON MATTER OF SUPERSEDEAS BOND

Before HONORABLE HENRY N. GRAVEN,
United States District Judge.

APPEARANCES:

MR. BOYD G. HAYES and MR. RALPH ZASTROW, Attorneys, Charles City, Iowa, for Plaintiff.

MR. DAVID A. SCRIBNER, Attorney, New York City, N. Y.

MR. R. J. SULLIVAN, Attorney, New Hampton, Iowa, for Defendants.

Hearing on motion for judgment notwithstanding verdict and new trial at Federal Court House, Waterloo, Iowa, May 19, 1952.

Mr. Scribner: If the Court please, I have one thing to say with respect to the supersedeas bond, and I respectfully ask the Court, in the event that this motion is denied, to

issue an order with respect to bond pending appeal which would suffice for the payment of costs. The reason I state that is that, as I understand the Rule—it is Rule 52 I think—makes it completely discretionary with the Court to determine the amount of the bond. If the bond were to be in the entire amount of $68,000.00 it would create a tremendous burden on the defendants—not to say that the defendants are not solvent; they are solvent. But it is a question of setting aside the equivalent of $68,000.00, because that is the procedure nowadays with a Bonding Company. When you go to a Bonding Company and there is a judgment against you, say for $68,000.00, they want that sum put up. While the defendants are solvent, yet it would create a hardship and difficulty to set aside so much money, particularly when there are serious questions of law involved, such as we have here. I am hopeful that we won't have to get to the question of the bond, and that the Court will grant a new trial. In the event that it is not, I suggest, if it please the Court, that it would be equitable and that the plaintiff would be safeguarded in the event that a bond was required for costs.

The Court: I have recently been through that in the Southern District of Iowa where I was acting by special assignment, and it was held that I hadn't any authority or jurisdiction to waive supersedeas. Application was made by the defendant and they went to the Circuit Court of Appeals who said that I had no authority to waive supersedeas. Central Surety Company was the plaintiff in that case—it was not published. I said that I would do it if I had the authority, and they went on up to the Circuit Court who said that I had no authority, that the Rules provide for supersedeas, and that I had no authority to waive same.

Mr. Scribner: It goes to the amount of the supersedeas.

The Court: I cannot waive that.

Mr. Scribner: I appreciate that.

The Court: They had to cover the amount of the judgment.

Mr. Scribner: Then I would have to go into that again.

The Court: The Eighth Circuit says that I can't do it.

Mr. Scribner: In the event that the motion for a new trial is denied may we have the opportunity of submitting to you a motion on the question of supersedeas?

The Court: I went through that matter just a few months ago in which that very thing came up, in which I was willing to do the same thing, and counsel took the matter up to the Court of Appeals who said that I could not do it.

Mr. Scribner: I presume that I shall have to have confidence that your Honor will grant a new trial.

The Court: In that case, the other side objected to a reduction of the supersedeas. The motion will be marked submitted.

Whereupon said hearing concluded.

CERTIFICATE OF OFFICIAL COURT REPORTER

I, CARL V. RILEY, official federal court reporter, United States District Court, Northern District of Iowa, do hereby certify that I took down in shorthand the proceedings had upon the trial and motion for a new trial in the case of Oliver Corporation, plaintiff vs. United Electrical Radio and Machine Workers of America, U.E., et al., defendants, No. 533 Civil, pending in the United States District Court, Northern District of Iowa, Eastern Division, and that the above and foregoing pages of transcripts, Nos. 1 to 3, constitute a true, complete, and accurate translation of my said shorthand notes, relating to the discussion of the Court and Counsel on the matter of supersedeas bond.

Witness my hand this 6th day of August, 1952.

CARL V. RILEY,
Official Federal Court Reporter.